

NetChoice *Promoting Convenience, Choice, and Commerce on The Net*

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Sen. Dee L Brown, Chair
Rep. Bryce Bennett, Vice Chair
State Administration and Veterans' Affairs Interim Committee
Helena, MT 59620-1706

April 19, 2016

RE: HJR 21 — Personal Information Ownership Study

Dear Councilmembers,

NetChoice is an association of leading e-commerce and online companies, plus thousands of small businesses that rely on e-commerce. We work to promote the integrity and availability of the global internet and are significantly engaged in privacy issues in the states, in federal government, and in international internet governance organizations.

Internet Coalition (IC), is a national trade association that represents member companies in state public policy discussions. The IC serves as an informational resource, striving to protect and foster the Internet economy and the benefits it provides consumers.

Privacy-related laws that specify how data can be collected, used, and shared can create barriers to legitimate online commerce. NetChoice has a long history of breaking down regulatory barriers, beginning with helping travel agents, contact lens suppliers, and real estate brokers whose online innovations clashed with legacy regulations that protect traditional business models.

The modern Hippocratic oath says, first "Do No Harm." We ask the Montana legislature to take this same approach when addressing privacy issues surrounding online privacy issues.

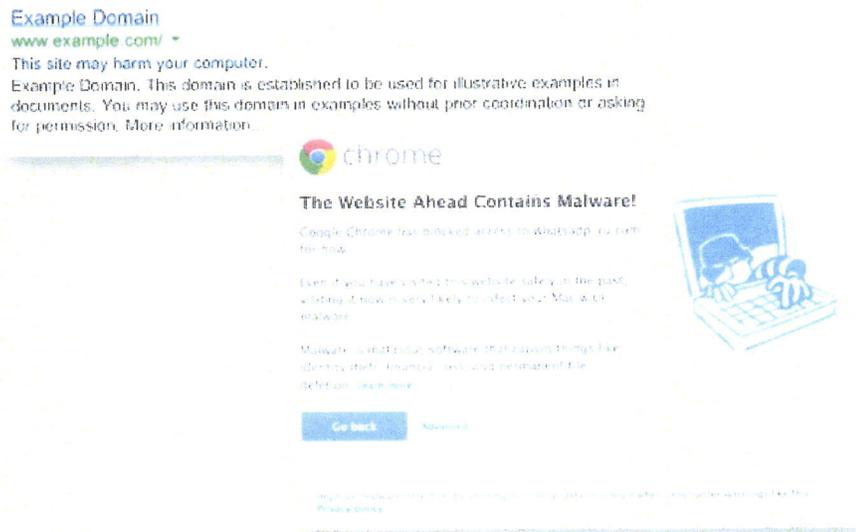
Online Services Take Strong Steps to Protect User Privacy

Online service providers believe in making the online experience as good as it can be. They want to make sure the user experience is safe and secure.

They take their users' privacy seriously and online services are going above and beyond to protect users when using their services and online in general. Online services are:

- Focusing on security by design
- Sharing discovery of security threats and vulnerabilities with competitors
- Creating bug bounty program that pays hackers for finding gaps
- Working to fully encrypt 100% of network traffic
- Engaging in Domain-based Message Authentication, Reporting and Conformance (DMARC)

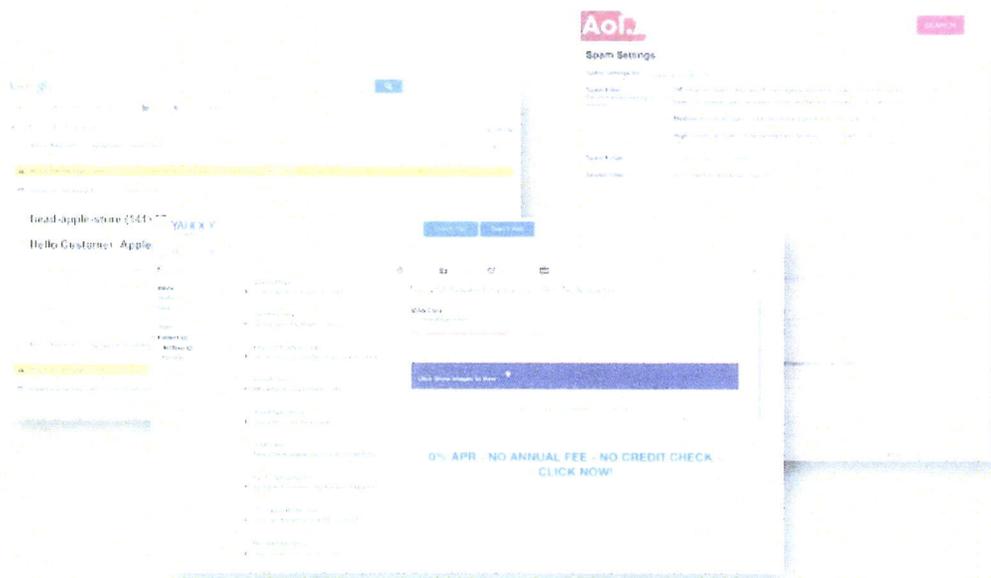
Moreover, online services providers inform users when their activities are putting their privacy and security at risk. And they work to block and flag malicious emails and spam.



Stopping Dangerous Sites

Search engines notify users about potentially dangerous websites

Blocking & Flagging Spam



Reviewing Existing Laws and Regulations

When considering whether to introduce laws and regulations that could dramatically upset businesses or services for Montana residents, it's important to analyze whether existing laws already address concerns.

FTC Section 5, FDA regulation, the Health Information Privacy Portability Act (HIPPA), Gramm-Leach Bliley Act (GLB), and state laws like the California Online Privacy Protection Act (CalOPPA),¹ already provide regulators with ample authority to compel service providers to develop useful and comprehensive privacy policies.

Existing Privacy Protection Regulation

Section 5 of the Federal Trade Commission (FTC) act² allows the FTC, and every state AG to bring an action against a business for unfair or deceptive trade practices. This means that if a business violates their privacy policy, Montana's AG can, today, take action.

Moreover, under existing laws, virtually every app is required to have a privacy policy. And existing laws require apps to conspicuously post a privacy policy detailing, clearly and completely, how the application collects, uses, and shares personal data.

¹ The Online Privacy Protection Act of 2003, Cal. Bus. & Prof. Code §§ 22575-22579

² 15 USC § 42

Likewise, health data and financial data is already heavily protected under HIPPA, GLB, and FDA regulations.

We've already seen strong enforcement of existing privacy laws and regulations by state AGs and the FTC. In late 2012, the California AG began taking enforcement actions against services for not having privacy policies. The AG sent out a wave of notifications to 100 companies in October 2012, warning app developers to post privacy policies or risk fines as high as \$2,500 per app download.³ The AG then took action against developers, including Delta Airlines.⁴

FTC statements show the agency believes it has enforcement authority against an app for lack of a privacy policy, or one that fails to disclose material information.⁵ And the FTC is aggressively on the beat when it comes to services not abiding by their privacy policies. Last year, the FTC took action against Path,⁶ Goldenshores Technology, and most recently SnapChat⁷ for collecting information outside the scope of the privacy policy. And the FTC settlement with Fandango and Credit Karma further showed that promises made in privacy policies extend to the security of information transmitted and stored.⁸ Clearly, the FTC already has the legal authority it needs to regulate privacy within services.

The Department of Health and Human Services (HHS) and Food and Drug Administration (FDA) are already involved in the regulation of health privacy. For example, the FDA issued guidance regarding the regulation and certification of mobile health apps, stating, "The FDA is taking a tailored, risk-based approach that focuses on the small subset of mobile apps that meet the regulatory definition of 'device' and that: are intended to be used as an accessory to a regulated medical device, or transform a mobile platform into a regulated medical device."⁹

So it is clear that there are plenty of existing laws, regulations, and enforcement mechanisms to protect the privacy of Montana's residents.

Enforcement

- FTC
- FDA
- State AGs

Existing Laws

- Section 5 of FTC Act
- Gramm-Leach Bliley
- Health Information Privacy Portability Act

Self-Regulatory

- Digital Advertising Alliance
- Network Advertising Initiative
- Interactive Advertising Bureau

Giving Users Control/Choice/Information about Their Privacy

³ Press Statement, Attorney General Kamala D. Harris Notifies Mobile App Developers of Non-Compliance with California Privacy Law, California AG Office (Oct. 30, 2012), available at <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-notifies-mobile-app-developers-non-compliance>

⁴ Press Statement, Attorney General Kamala D. Harris Files Suit Against Delta Airlines for Failure to Comply with California Privacy Law, California AG Office (Dec. 6, 2012), available at <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-files-suit-against-delta-airlines-failure>

⁵ See e.g., Sears Holdings Mgmt. Corp., Docket No. C-4264, File No. 0823099 (Fed. Trade Comm'n Sept. 9, 2009) (decision and order), available at <http://www.ftc.gov/os/caselist0823099/090604searsdo.pdf>

⁶ Press Statement, Path Social Networking App Settles FTC Charges it Deceived Consumers and Improperly Collected Personal Information from Users' Mobile Address Books, FTC (Feb. 1, 2013), available at <http://www.ftc.gov/news-events/press-releases/2013/02/path-social-networking-app-settles-ftc-charges-it-deceived>

⁷ Snapchat Inc., Docket No. C-4264, File No. 1323078 (Fed. Trade Comm'n) (decision and order), available at <http://www.ftc.gov/system/files/documents/cases/140508snapchatorder.pdf>

⁸ Press Statement, Fandango, Credit Karma Settle FTC Charges that They Deceived Consumers By Failing to Securely Transmit Sensitive Personal Information, FTC (Mar. 28, 2014)

⁹ Food and Drug Administration, Mobile Medical Applications (10/23/13).

far more difficult to entice users to opt-in, even just for non-personal data. This would decrease competition in Internet space and perhaps slow the exciting growth businesses have enjoyed.

Preventing data collection for online ads and services would harm Montana consumers, too.

As a result of an opt-in regime, Internet advertising in could see a \$33 billion decline in ad revenue over the first 5 years, with three predictable results:

1. Montana residents will **see more and larger ads** that are less relevant, as websites attempt to make-up lost revenue from the decline in interest-based ads
2. Websites will have **less funding** to pay for new services and content
3. Some websites will **erect "pay walls"** that require users to fund content and services that are free today

Avoid broad regulations.

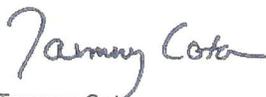
Now is not the time for Montana to emulate mistakes made by the European Union nor create devastating new regulations for service providers. Please don't deprive Montana of the benefits of online services that are now the envy of the world.

Thank you for considering our views and please let me know if we can provide further information.

Sincerely,



Carl Szabo
Policy Counsel, NetChoice



Tammy Cota
Executive Director, The Internet Coalition

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